



KAPLAN KIRSCH ROCKWELL

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December 28, 2010

E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Eighteen Thirty Group, LLC – Acquisition Exemption – Line of Railroad in Allegany County, MD*
STB Finance Docket No. 35438

Georges Creek Railway, LLC – Operation Exemption – Line of Railroad in Allegany County, MD
STB Finance Docket No. 35437

Duncan Smith and Gerald Altizer – Continuance-in-Control – Verified Notice of Exemption under 49 C.F.R. § 1180.2(d)(2)
STB Finance Docket No. 35436

Dear Ms. Brown:

I am enclosing the Reply of Allegany County, Maryland, to the Motion to Dismiss filed by James Riffin in the above-captioned proceedings.

Thank you.

Sincerely,

Charles A. Spitulnik/she

Charles A. Spitulnik

Enclosure

cc: All parties of record

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

**STB FINANCE DOCKET NO. 35438
EIGHTEEN THIRTY GROUP, LLC
ACQUISITION EXEMPTION
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

**STB FINANCE DOCKET NO. 35437
GEORGES CREEK RAILWAY, LLC
OPERATION EXEMPTION
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

**STB FINANCE DOCKET NO. 35436
DUNCAN SMITH AND GERALD ALTIZER
CONTINUANCE-IN-CONTROL
VERIFIED NOTICE OF EXEMPTION UNDER 49 CFR § 1180.2(d)(2)**

**REPLY OF ALLEGANY COUNTY, MARYLAND
TO MOTION TO DISMISS OF JAMES RIFFIN**

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Counsel for Allegany County, MD

Dated: December 28, 2010

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**REPLY OF ALLEGANY COUNTY, MARYLAND
TO MOTION TO DISMISS OF JAMES RIFFIN**

Pursuant to 49 C.F.R. § 1104.13(a), the Board of County Commissioners of Allegany County, Maryland, acting on behalf of Allegany County, a political subdivision of the State of Maryland ("County"),¹ hereby submits its reply to the Motion of James Riffin to Dismiss for Lack of Jurisdiction, filed in this proceeding on December 8, 2010 (the "Motion").² The County acknowledges and generally supports the arguments for denial contained in the Joint Reply

¹ The County is a party to the pending related matter, *CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X), which concerns the same real property. As a party to the related proceeding and as the local governmental unit within which the subject line is located, the County hereby moves to intervene, and to be formally entered as a party, in the above-captioned matters.

² The County does not respond here to the Replies of James Riffin and Lois Lowe, submitted into the record of these proceedings on Dec. 1, 2010, other than to request that the Board reject those pleadings as impermissible replies to a reply. 49 C.F.R. § 1104.13(c). Even under the Board's occasionally liberal approach to granting leave to file such replies, the Replies filed by Mr. Riffin and Ms. Lowe contribute nothing to the record that would assist the Board in its consideration of these matters and should accordingly be rejected.

Comments of Respondents filed by Duncan Smith, Gerald Altizer, Georges Creek Railway, LLC, and Eighteen Thirty Group, LLC (collectively, "Respondents"), in these proceedings on December 21, 2010 ("Joint Reply"). For all of the reasons stated herein, the Motion must be denied.

BACKGROUND

Since 2006, Allegany County has represented the public interest in a series of STB and local court proceedings involving James Riffin ("Riffin") and his attempt to claim rail carrier status in connection with the Georges Creek Branch, the line of railroad at issue in the above-listed proceedings. Allegany County, Motion for Extension of Time, *CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (Filed Jun. 30, 2006). In October, 2007, Riffin filed an ultimately unsuccessful complaint for injunctive relief in the Allegany County Circuit Court seeking prospectively to bar the County from administering or enforcing any state or local permitting authority over any work Riffin might undertake along the line. *Riffin v. Allegany County*, Circuit Court for Allegany County, MD, Case No. C-07-29061 (July 10, 2008) (Mem. and Order). Riffin has unsuccessfully challenged several of the Board's actions relating to the Georges Creek Branch in the U.S. Court of Appeals for the District of Columbia Circuit. *See, e.g., Riffin v. STB*, D.C. Cir. Case No. 09-1277 (D.C. Cir. 2010) (per curiam) (affirming STB's determination that Riffin is not a rail carrier in Allegany County and therefore cannot use asserted rail carrier status there to support a claim that he is a rail carrier in any other location) (petition for panel hearing pending). In addition, through ongoing proceedings before this Board, including the instant matters, Riffin has continued to seek administrative remedies for difficulties that are entirely of his own making.

On January 20, 2010, Riffin filed a voluntary petition for bankruptcy under Chapter 7 (i.e., as an individual and not as a railroad entity) of the Bankruptcy Code at 11 U.S.C. in the United States Bankruptcy Court for the District of Maryland (Case No. 11-248). As described in the Joint Reply, the Trustee in bankruptcy for Riffin's estate is pursuing the orderly disposition of Riffin's assets, which, according to the Trustee, includes the Georges Creek Branch addressed in the three above-captioned matters. Joint Reply at 3.

ARGUMENT

1. The Board Should Reject the Motion as Untimely Filed

The County concurs with the request contained in the Joint Reply that the Motion was untimely under the Board's rules at 49 C.F.R. § 1104.13(a) and should therefore be rejected. As applicable here, a motion addressed to any pleading must be filed within 20 days after that pleading is filed with the Board. Since the Notices of Exemption in the three cases at issue here were all filed on October 19, 2010, any motion addressing those pleadings would have been due no later than November 18, 2010. To the extent Riffin intended the Motion as a response to the Reply filed by the Respondents in these proceedings on Nov. 17, 2010, the Motion is one day overdue. Without giving any explanation for his delay, Riffin filed the Motion either some 20 days or one day late, respectively. Because the Motion was untimely filed no matter which pleading it seeks to address, it should be rejected.

2. The Board Should Reject the Motion as An Impermissible Reply to A Reply

The Motion constitutes an impermissible reply to a reply under the Board's rules at 49 C.F.R. § 1104.13(c) and should therefore be rejected. To the extent Riffin intends the Motion to refute arguments contained in the Respondents' November 17, 2010, Reply in these proceedings, the Motion is a reply to a reply, which is not permitted under the Board's rules. The Motion should accordingly be rejected.

3. The Board Should Reject the Motion because Riffin Improperly Seeks to Reopen Administratively Closed Proceedings

The exemptions sought (a) by Duncan Smith and Gerald Altizer in Finance Docket No. 35346, (b) by Georges Creek Railway, LLC in Finance Docket No. 35347 and (c) by Eighteen Thirty Group, LLC in Finance Docket No. 35348, all became effective on November 18, 2010, and are therefore all administratively final. To reopen an administratively final decision, a complainant must demonstrate material error on the part of the Board, present new evidence, or describe substantially changed circumstances. *See* 49 C.F.R. § 1152.25(e)(4). Riffin's Motion does none of those. As he has done in numerous prior matters before this Board (*see, e.g.,* Reply of the Maryland Transit Administration to James Riffin's Petition to Reopen, *Norfolk Southern Ry. Co. – Abandonment of Rail Freight Service Operation in the City of Baltimore, MD, and Baltimore County, MD*, STB Docket No. AB-290 (Sub-No. 311X) (Filed May 20, 2010)), Riffin has simply ignored the Board's criteria and procedures for reopening an administratively final proceeding.

Riffin fails to demonstrate any basis for reopening the Board's Notices of Exemption issued on November 5, 2010 (the "Notices"), all of which are now in effect, in the three instant proceedings. No further action by this Board with respect to the Notices is necessary in order for the Respondents to exercise the acquisition, operation, and continuation in control authority they have obtained from the Board. Subject to (a) a Decision by this Board in related proceeding AB-55 (Sub-No. 659X) on the request by Eighteen Thirty Group, LLC, to exempt its proposed acquisition of the Georges Creek Branch out of bankruptcy from the requirements of 49 U.S.C. § 10904(f)(4)(A) and (b) a determination by the Bankruptcy Court as to the state of title in the line and approval by that Court of the settlement proposed by the Trustee and Respondents, the Respondents will be able to complete their acquisition of the Georges Creek Branch. The

Board's administrative record in the three matters addressed by the Notices is therefore closed and can only be reopened as set forth in the Board's rules.

As a result, the Board should reject the Motion because it fails to satisfy the Board's criteria for reopening an administratively final proceeding.

4. The Board Should Reject the Motion because the Board Cannot Grant the Relief Riffin Seeks

The Motion is entirely premised on Riffin's fundamental failure to understand the distinction between the consummation of a transaction under general property law principles and state statute on one hand, and, on the other hand, the consummation of the abandonment of a rail line under the Board's specific statutes and regulations. As was the case in pending Docket No. AB-55 (Sub-No. 659X), when a line is transferred as part of an offer of financial assistance ("OFA") acquisition, the transfer supplants the proposed abandonment to allow the offeror to operate the line. Riffin incorrectly asserts that CSX Transportation, Inc. ("CSX") consummated the abandonment of the line when it issued a deed dated July 10, 2006, to WMS, LLC, for the Georges Creek Branch. Motion at ¶ 9. As is clear from the record in AB-55 (Sub-No. 659X), CSX had effected its portion of the transfer of the line on that date, but made no assertion as to any abandonment of the common carrier obligation. CSX Letter, July 10, 2006, *CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (Filed July 10, 2006). Indeed, since CSX issued the deed to WMS, LLC in the context of an OFA proceeding under 49 U.S.C. § 10904, any abandonment by CSX would have run counter to the commercial purpose and statutory requirements of the transaction to permit the continuation of freight rail service on the line. 49 U.S.C. § 10904. CSX has done all it needed to do to effect the transfer pursuant to the applicable OFA. Since the line has not been abandoned, even though Riffin has failed to complete the OFA process, the Georges Creek

Branch remains within the Board's jurisdiction. 49 U.S.C. § 10903; *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004). Riffin's assertion that CSX somehow effected an abandonment of the line when it issued a deed transferring the line's real property is incorrect as a matter of law and logic.

Riffin's continuing failure over the past four and half years to perfect his or WMS, LLC's interests in the Georges Creek Branch is the true root of his troubles. Since the Board authorized Riffin as the substitute offeror for the line in 2006 (*CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (Service Date Aug. 18, 2006)), it has been up to Riffin to exercise the permissive authority granted to him by the Board. Riffin cannot claim that his own failure to take the steps necessary to perfect his or WMS, LLC's real property interest, make necessary repairs, and commence service, have resulted in "no one [having] a common carrier obligation with respect to the [line]" (Motion at ¶ 12). Accordingly, there is no action for the Board to take and nothing the Board can do to extricate Riffin from difficulties of his own making.


Riffin cannot deploy his errors in legal interpretation and logic to get around the hard facts that (a) he voluntarily submitted his assets to the jurisdiction of the Bankruptcy Court, and the Court is now disposing of those assets for the benefit of Riffin's creditors pursuant to the Bankruptcy Code and relevant Maryland property law, and (b) this Board has determined, and the D.C. Circuit has affirmed, that Riffin is not a rail carrier – not here, not anywhere. Because the Board indisputably retains jurisdiction over the Georges Creek Branch, Riffin's motion that the Board dismiss the now-final Notices for lack of jurisdiction must be denied.

CONCLUSION

Riffin's Motion impermissibly asks this Board to correct Riffin's own errors of law, strategy and execution in carrying out his authority under the OFA. The Motion is improperly filed on its face. In substance the Motion gives the Board no basis on which to grant the relief Riffin seeks. It should accordingly be expeditiously denied.

WHEREFORE, and in view of the foregoing, the County respectfully requests this Board to expeditiously deny the Motion to Dismiss.

Respectfully submitted,



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Counsel for Allegany County, MD

Dated: December 28, 2010

Certificate of Service

I hereby certify that I have this 28th day of December, 2010, caused to be served a copy of the foregoing Reply of Allegany County, Maryland, to Motion to Dismiss, upon the following parties of record:

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